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TREATMENT OF CONFIDENTIAL INFORMATION BY INTERNATIONAL TREATY BODIES AND ORGANIZATIONS

Technical paper*

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I. INTRODUCTION

A. Mandate

1. At its seventh session, the Conference of the Parties (COP), by its decision 23/CP.7, requested the Subsidiary Body for Scientific and Technological Advice (SBSTA), at its seventeenth session, to consider options for the treatment of confidential data during the review activities under Article 8 of the Kyoto Protocol, with a view to recommending to the COP, at its eighth session, a decision on this matter for adoption by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (COP/MOP) at its first session after the entry into force of the Kyoto Protocol (FCCC/CP/2001/13/Add.3).

2. At the same session, the COP requested the secretariat to prepare a document containing an analysis of the practices of other international treaty bodies and organizations relating to the treatment of confidential information, for consideration by the SBSTA at its sixteenth session, and invited Parties to submit their views on the question of confidentiality referred to in paragraph 1 above, by 1 August 2002 (FCCC/CP/2001/13/Add.3).

B. Scope of this technical paper

3. This technical paper was prepared in response to the mandate of the COP mentioned in paragraph 2 above.

C. Possible action by the SBSTA

4. The SBSTA may wish to take note of the information contained in this paper. It may also wish to consider this information at its seventeenth session, in accordance with the mandate mentioned in paragraph 1 above.

II. BACKGROUND

A. General

5. Transparency, or the disclosure and public sharing of information, is essential for the effective implementation of numerous international agreements.[1] Transparency can refer to the exchange of unshielded data, or it can apply to a process that is conducted in an open and readily apparent manner. When confidentiality claims are asserted over data that is used to determine compliance with an international agreement, the transparency of the entire process is diminished. The level of transparency reflects the degree to which knowledge and information about a Party's performance and adherence to its treaty commitments are adequate, accurate and available for review and evaluation by treaty institutions, other Parties and civil society as a whole.

6. Parties to an agreement are better able to coordinate their efforts and more effectively achieve the goals of the agreement when they possess accurate knowledge of what others are doing. This also serves to reassure parties that their own compliance efforts will not be undercut by "free riders". Transparency can also stimulate debate and broaden understanding among the many parties involved in international agreements, and can serve to strengthen public support for these efforts.

7. But the exchange of information can also raise questions about the disclosure of sensitive or confidential information. The barriers of confidentiality entail trade-offs between openness and privacy,

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[1] "Environmental Change and International Law: New Challenges and Dimensions", edited by Edith Brown Weiss, United Nations University Press, 1992, available at: http://www.unu.edu/unupress/unupbooks/uu25ee/uu25ee00.htm#Contents

and between private interests and public confidence. Although access to data is generally expected or preferred, exceptions exist in order to protect certain legitimate interests which might be harmed by disclosure of information. In order to ensure that the exceptions in any legal instrument do not overwhelm the right of access, they should be specified in clearly defined terms and applied only after explicitly balancing the harm disclosure would cause against the public interest in having access to information. In cases where there are disputes about the application of confidentiality, the body or authority designated to mediate these disputes will need to refer to the original balance of interests to resolve the matter.

8. In most cases, exceptions are designed to prevent the releasing of confidential information related to international relations, national defence, public security or personal privacy. Other exceptions of importance in relation to requests for information concern confidential commercial and industrial information, matters under inquiry, information voluntarily supplied in excess of the minimum reporting required, deliberative or pre-decisional internal communications and unfinished documents.[2]

B. Confidentiality and the United Nations Framework Convention on Climate Change and the Kyoto Protocol

9. The United Nations Framework Convention on Climate Change (UNFCCC) guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part I: UNFCCC reporting guidelines on annual inventories (decision 3/CP.5) stipulate that, "Emissions and removals should be reported at the most disaggregated level of each source/sink category, taking into account that a minimum level of aggregation may be required to protect confidential business and military information" (FCCC/CP/1997/7, para. 19, page 8).

10. Article 8, paragraph 3, of the Kyoto Protocol establishes a review process that, "shall provide a thorough and comprehensive technical assessment of all aspects of the implementation by a Party of this Protocol". Expert review teams will prepare reports that assess the Parties' implementation and identify potential questions of implementation.

11. At its seventh session, the COP agreed to recommend for adoption by the COP/MOP, guidelines for review under Article 8 of the Kyoto Protocol (decision 23/CP.7), which include two paragraphs specifically addressing the review of confidential information (FCCC/CP/2001/13/Add.3, Part I General Approach to Review, paras. 9 and 10, page 39):

> "Pursuant to a request from the expert review team for additional data or information or access to data used in the preparation of the inventory, a Party included in Annex I may indicate whether such information and data are confidential. In such a case, the Party should provide the basis for protecting such information, including any domestic law, and upon receipt of assurance that the data will be maintained as confidential by the expert review team, shall submit the confidential data in accordance with domestic law and in a manner that allows the expert review team access to sufficient information and data for the assessment of conformity with the IPCC Guidelines as elaborated by the IPCC good practice guidance and any good practice guidance adopted by the COP/MOP. Any confidential information and data submitted by a Party in accordance with this paragraph shall be maintained as confidential by the expert review team, in accordance with any decisions on this matter adopted by the Conference of the Parties serving as the meeting of the Parties."

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[2] Public access to environmental information, Expert's Corner no. 1997/1. 2. 3. Access to environmental information: key elements and good practices (2.3.6 Exceptions). Available at: http://reports.eea.eu.int/92-9167-020-0/en/page001.html

"An expert review team member's obligation not to disclose confidential information shall continue after termination of his or her service on the expert review team."

12. The Parties to the UNFCCC and the Kyoto Protocol have numerous commitments to report and provide data. This paper focuses on confidential information related to national inventory reporting under the Kyoto Protocol. Confidential information may be encountered in the annual reporting of emission inventory data under Article 7, paragraph 1, or in the annual review of inventories under Article 8. The information in this paper may be relevant to other articles and areas of the Kyoto Protocol, such as the functioning of the Compliance Committee or the projects under Articles 6 and 12 of the Kyoto Protocol.

13. In the past, Parties have asserted confidentiality claims over production and use data on emissions of hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF_6) from the industrial sector. Table 1 lists the emission source categories of a national inventory and indicates the areas that are most likely to cause concern in relation to the disclosure of confidential information. Because each Party will develop its own national system in a unique manner, based on its own institutions, procedures and practices, this table is for illustrative purposes only and may vary slightly across Parties.

Table 1. Confidential information in national GHG emissions inventories

Inventory category	C.I. in Top-Down Inventory	C.I. in Bottom-up Inventory	C.I. in Reporting	C.I. in Review
Energy	No	Yes	No	Yes*
Industry	Yes**	Yes	Yes**	Yes*
Agriculture	No	No	No	No
LUCF	No	No	No	No
Waste	No	No	No	No
Int'l Bunker Fuels	No	No	No	No
Military	Yes	Yes	Yes	Yes

* Confidential information about individual facilities that has been reported in an aggregated or anonymous form may be encountered or needed in an in-depth review of inventory background files.

** Information on production and consumption of HFCs, PFCs and SF_6 is often based on facility-specific measurements and is frequently treated as confidential. The ease with which this information could be aggregated or reported anonymously depends on the size of the industry in that country; having more facilities operating makes the task of reporting aggregated data easier.

14. Take, for example, the reporting of energy data under the current guidelines for national inventory reporting. Parties to the UNFCCC are required to report emissions related to national energy consumption, but are not required to disclose either the emissions or fuel use of individual companies. In the process of compiling national energy data, some Parties rely on survey questionnaires to gather specific data from companies and individuals on fuel use patterns and emissions profiles. A Party may consider some of the information collected in this manner to be confidential pursuant to domestic law. To be specific, the actual survey responses may be considered confidential, or at least sensitive, whereas the aggregated fuel use data are not. In table 1, this situation is summarized as a case where there is no confidential information in the reported "top-down" inventory data, although confidential information may be encountered during the in-depth review process. In this case, guidance in the processing of confidential information during the review process is warranted.

III. DESCRIPTION OF DIFFERENT APPROACHES TO CONFIDENTIAL INFORMATION

15. Concerns over confidentiality may arise in many different contexts and the methods and procedures used to prevent unintended disclosure are myriad. Different approaches to confidential information management have been developed, reflecting a range of concerns about the appropriate response to the risk of disclosure and the nature of the data in question. Who should have access to the confidential data and under what type of restrictions? Who should decide who has access to the data? How will the data be stored? How will data be disclosed and at what level of aggregation? These types of questions apply both to the reporting Party and to any central authority or secretariat that is the recipient of reported information. The type of data collected, reported and stored is an important element in the selection of the appropriate procedures and policies employed to prevent unintended or harmful disclosure.

16. This paper presents a review of the rules and practices of selected international treaties and organizations with regard to the processing of confidential information and its disclosure. The agreements and organizations reviewed are:

(a) The Montreal Protocol on the Protection of the Ozone Layer;[3]

(b) The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);[4]

(c) The World Trade Organization (WTO);[5]

(d) The North American Free Trade Agreement (NAFTA);[6]

(e) The European Environment Agency (EEA);[7]

(f) Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction; [8] and

(g) The United States Freedom of Information Act.[9]

17. The processing of confidential data varies across regulatory instruments, reflecting their specific characteristics and purposes, including the type of data gathered and the level of review foreseen. In the case of the Montreal Protocol, two different types of data processing and reporting are employed: one by the Parties and one by individual companies. Among the alternatives to disclosing detailed confidential data are the use of aggregation or anonymous reporting, or reporting to a third party.

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[3] See the "Ozone Treaties", including the 1997 Montreal Protocol and its amendments, at: http://www.unep.ch/ozone/treaties.shtml

[4] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which was adopted on 3 March 1973 and entered into force on 1 July 1975. Available at: http//www.cites.org/

[5] See WTO's constituting legal texts, including the Agreement establishing the World Trade Organization at: http://www.wto.org/english/docs_e/legal_e/final_e.htm

[6] See NAFTA's legal texts at: http://www.nafta-sec-alena.org/english/index.htm

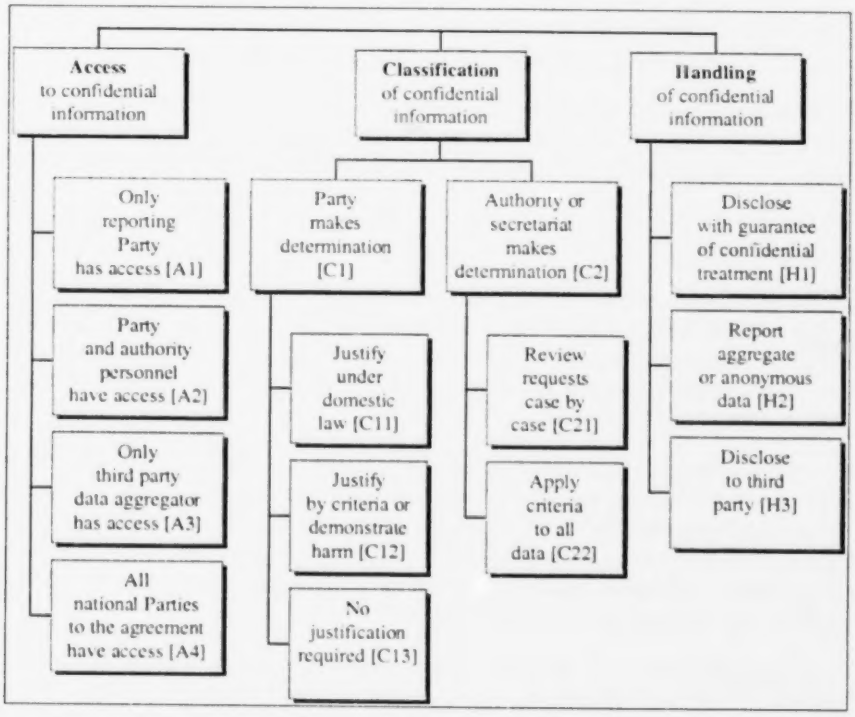
[7] Council Regulation (EEC) No 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European environment information and observation network (OJ L 120,11.5.1990,p.1). Available at: http://europa.eu.int/eur-lex/en/consleg/pdf/1990/en_1990R1210_do_001.pdf See also EEA's home page at: http://www.eea.eu.int/

[8] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Available at: http://www.opcw.nl/ [hereinafter Chemical Weapons Convention].

[9] United States Freedom of Information Act (FOIA), 5 USC 552.

18. The agreements and organizations reviewed for this paper use different approaches to classify confidential information. In some cases, the determination of what is confidential is left entirely to the Party, as in that of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the WTO, while in others, it is based on a judgement of the secretariat or other empowered authority under the agreement, as in those of CITES and the Chemical Weapons Convention. The figure below presents a schema of different approaches to classification, and also illustrates different modes of reporting confidential data. Each box in this figure is labelled with a code to facilitate reference to this figure throughout the text.

Figure. Confidential data classification and processing


Access to confidential information
Classification of confidential information
Handling of confidential information
Only reporting Party has access [A1]
Party and authority personnel have access [A2]
Only third party data aggregator has access [A3]
All national Parties to the agreement have access [A4]
Party makes determination [C1]
Authority or secretariat makes determination [C2]
Justify under domestic law [C11]
Justify by criteria or demonstrate harm [C12]
No justification required [C13]
Review requests case by case [C21]
Apply criteria to all data [C22]
Disclose with guarantee of confidential treatment [H1]
Report aggregate or anonymous data [H2]
Disclose to third party [H3]

19. Table 2 makes use of the codes from the above figure to provide a "mapping" of each international agreement into the appropriate method for classifying, processing and providing access to confidential information. Table 2 summarizes the ways in which confidential information is handled under the different agreements, but the reader should bear in mind that each agreement has unique data concerns and procedures that are not identical, even when the same general method for processing data is used.

Table 2. Summary of access, classification and processing methods used under international agreements

Agreement	Access	Classification	Processing
Montreal Protocol	A3, A4	C13	H2, H3
CITES	A4	C22	H2
WTO/TRIPS	A2	C12, C22	H3, H1
NAFTA	A2	C11	H1, H3
EEA	A2	C11	H2
Chemical Weapons Convention		C22	

A. Classification of confidential information

20. This section summarizes and describes alternative approaches to identifying and classifying confidential information. In general, these alternatives can be distinguished by who makes the assertion and classification of confidentiality – the Party or some external authority designated as such by the agreement.

Party makes determination

21. Parties often have a strong interest in the disclosure of other Parties' information – as well as, in some cases, that of legal entities under their jurisdiction – which is relevant for the information-gathering purposes of a given regime. However, in some cases it may not be appropriate for either a Party or a legal entity to disclose certain types of information which are deemed confidential according to criteria under national or international law.

22. As a result, under some agreements, the Party in question is required to actively indicate its desire that certain information be deemed confidential in order for it to be afforded the appropriate treatment. Commercial confidentiality may be protected by an exception that is strictly limited to specific information, such as a confidential trade secret (i.e., information that is not known to parties other than the company and public authority in question) which, were it to be released, would significantly harm the company and aid its competitors.

23. The Montreal Protocol was one of the first international environmental agreements to recognize that the collection and sharing of inventory information is an important means of implementing and measuring progress towards the objective of reducing the release of ozone-depleting substances. The Montreal Protocol requires each Party to report annual information related to the consumption of individual ozone-depleting substances (CFCs and HCFCs) specified in Annexes A, B, C and E.

24. The information required by the Montreal Protocol includes statistical data on each Party's annual production, imports and exports of controlled substances, as well as the amounts of each substance that are either used for feedstocks for other chemical products, recycled or destroyed by approved technologies. At the Third Meeting of the Parties to the Montreal Protocol a distinction was made between production and consumption data (consumption at the national level is defined as production plus imports minus exports). Data on the production of controlled substances is considered confidential, while data on the consumption of controlled substances is not.

25. Decision 11 (b) of the Meeting of the Parties to the Montreal Protocol stipulates that a Party submitting data on controlled substances deemed to be confidential by that Party shall, in submitting the data to the secretariat, require a guarantee that the data will be treated with professional secrecy and maintained as confidential. The fact that each Party makes the determination and is not required to provide justification for it, this is illustrated in the above figure by box C13.

26. Under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[10] of the WTO, Parties have a duty to protect lawful confidential information or data provided to them by any natural or legal person. Confidential or undisclosed information, for the purposes of this agreement, must meet certain criteria (See figure, box C12) and is defined as information that:

(a) Is secret in the sense that it is not readily available to those who would normally use the information;

(b) Has commercial value because it is secret; and

(c) Has been subject to reasonable steps to keep it secret.[11]

27. The TRIPS Agreement does not require undisclosed information to be treated as a form of property, but it does require that a person lawfully in control of such information must have the possibility of preventing it from being disclosed to, acquired by, or used by others without his or her consent, in a manner contrary to honest commercial practices. "Manner contrary to honest commercial practices" includes breach of contract, breach of confidence and inducement to breach, as well as the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

28. Some agreements do not themselves regulate the treatment of confidential information, but rely on the law of the Parties or rules of other organs. Under Article 507.1. of the NAFTA Agreement, each Party shall maintain, in accordance with its law, the confidentiality of confidential business information and protect that information from disclosure that could prejudice the competitive position of the person or entity providing the information.[12]

29. In the context of the European Environmental Agency, Article 6 of the Council Regulation on the Establishment of the EEA, refers to the rules of the European Commission and of the Member States in respect of the public dissemination of information.[13] Parties will be more likely to agree to deliver confidential information if they know that it will be treated with the care accorded by their own regulatory standards (see figure, box C11).

Authority or secretariat makes determination

30. Under some agreements, it is up to the implementing authorities, e.g., the secretariat, to classify which information is to be deemed confidential. In such cases, confidentiality may be determined according to pre-determined criteria or on a case-by-case basis.

31. Under CITES, all Parties to the agreement are given access to all the relevant documents, including those classified as "restricted' or "confidential". However, the secretariat still maintains responsibility for classifying the status of the information received from Parties (individuals or organizations). The secretariat designates documents as "restricted" or "confidential" according to whether they include information that might be detrimental if disclosed to others, such as Parties or organizations (see figure, box C22). Therefore, although Parties have access to all information,

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[10] See TRIPS text at: http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

[11] TRIPS: Part II — Standards concerning the availability, scope and use of Intellectual Property Rights, Section 7: Protection of Undisclosed Information, Article 39. Available at: http://www.wto.org/english/tratop_e/trips_e/t_agm3d_e.htm

[12] NAFTA: Part II: Trade In Goods, Chapter Five: Customs Procedures, Section B - Administration and Enforcement (Article 507.1.: Confidentiality). Available at: http://www.nafta-sec-alena.org/english/index.htm

[13] EEA: Council Regulation (EEC) No 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European environment information and observation network (OJ L 120,11.5.1990, p.1); Article 6. Available at: http://europa.eu.int/eur-lex/en/consleg/pdf/1990/en_1990R1210_do_001.pdf

non-Parties are debarred from access to information deemed restricted or confidential by the secretariat.[14] Consequently, Parties must do their best to maintain any such restriction or confidentiality, unless the same authority has removed the classification.[15]

32. The Chemical Weapons Convention uses a dual approach to classifying information as confidential – either a Party or the Director-General of the Convention may determine whether a piece of information should be confidential. Furthermore, all data and documents obtained by the secretariat must be evaluated so as to establish whether they contain confidential information.[16]

33. Under the WTO, in principle, all WTO documents must be circulated as unrestricted, with certain exceptions set out in an annex.[17] Such documents are either to be automatically derestricted six months after circulation, at the latest, or considered for derestriction at that time. In the latter instance, derestriction will automatically occur unless a Member State objects in writing within a specified time limit (see figure, boxes C12 and C22).

B. Processing of confidential information

34. Processing refers to the manner in which confidential information is treated. Processing procedures clarify how data will be transmitted between Parties and authorities, including the manner in which the latter should treat such data. Special processing procedures can be employed by anyone dealing with confidential information and may occur several times during the flow of data. For instance, Parties may use one method of handling confidential data, then once the information is reported to an authority, the latter may use the same or different processing procedures.

Disclose with guarantee of confidential treatment

35. Under the rules of procedure for the operation of independent reviews under Article 4 of the WTO agreement on preshipment inspection, a Party may also request that certain information submitted to the review panel be treated as confidential (see figure, boxes H1 and H3). However, this again requires the Party to submit a non-confidential summary of the information concerned.[18]

Report aggregate or anonymous data

36. Another possible response to the need for confidentiality is for information to be disclosed anonymously. The information requested could be transmitted in a form from which sensitive or confidential information could be extracted later by the authorities. Such a practice is used under CITES for information submitted by Parties on seizures of ivory and other elephant products.[19] Variations of this approach may be found in many national laws regulating access to information, such as the European

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[14] CITES: SC46 Doc. 2; Forty-sixth meeting of the Standing Committee: Strategic and administrative matters; ADOPTION OF THE RULES OF PROCEDURE (Final Provisions Rule 31). Available at: http://www.cites.org/eng/cttee/standing/46/46-02.pdf

[15] CITES: Doc. AC.16.2; Sixteenth meeting of the Animals Committee: Rules of Procedure for Meetings of the Animals and Plants Committees as Approved at the 15th Meeting of the Animals Committee and the 9th Meeting of the Plants Committee (Final Provisions Rule 28). Available at: http://www.cites.org/eng/cttee/animals/16/16-2.pdf

[16] Chemical Weapons Convention, Annex on the Protection of Confidential Information, paragraph 2.

[17] WTO: Decision on Procedures for the Circulation and Derestriction of WTO Documents. Available at: http://www.wto.org/english/docs_e/ddf_e/derest_e.htm

[18] Annex III: Rules of procedure for the operation of independent reviews under Article 4 of the WTO agreement on preshipment inspection (9. Confidentiality, 9.2.). Available at: http://www.wto.org/english/news_e/pres96_e/psidoc.htm

[19] CITES: Notification to Parties No. 1999/92 Geneva, 30 November 1999; Concerning: Monitoring of illegal trade in ivory. Available at: http://www.cites.org/eng/notifs/1999/092.shtml

Union Directive on the freedom of access to information on the environment[20] and the United States Freedom of Information Act,[21] to name just two regulatory instruments (see figure, box H2).

37. To further ensure discretion and confidentiality, under CITES, each informant or source may also have a unique code name or number, so that the actual identity of the source need not be known for reporting purposes.[22]

38. These forms of anonymous disclosure make it possible to provide the responsible bodies with all the information they need, while simultaneously avoiding any possible threat to any confidentiality aspects, e.g., through the publication of personal or commercially sensitive data.

39. Under the Montreal Protocol, decision 11 (c) requires the secretariat to protect the confidentiality of the data it receives when preparing reports on controlled substances, by aggregating the data from several Parties in a way that will ensure that confidential data is not disclosed. An important principle in the use of aggregation as a means of preserving confidentiality, is to ensure that any statistics released must represent three or more data points. In that way, no single Party can deduce the exact emissions of another Party by subtracting its own data from a reported value. Using this technique, the secretariat is able to publish total data aggregated over all Parties for each individual controlled substance without disclosing any confidential information (see figure, box H2).

40. Decision 11 (d) of the Montreal Protocol establishes that other Parties have certain rights to access confidential data provided by other Parties, provided that a written guarantee is submitted ensuring that the data will be treated with "professional secrecy and not disclosed or published in any way". This provision has never been invoked.

41. Decision 11 (e) of the Montreal Protocol establishes that, when necessary, information will be made available on a confidential basis to resolve disputes under Article 11 of the Vienna Framework Convention on the Protection of the Ozone Layer (see figure, box H1).[23]

Disclose to a third, independent party

42. If a Party is required to submit confidential information that must not be disclosed, whether deemed confidential by the Party or by the authority, this information may also be submitted to a selected person or entity entrusted with ensuring that such information remains confidential.

43. The Montreal Protocol outlined above governs the process that Parties follow to report national consumption of ozone-depleting substances to the secretariat of the Montreal Protocol. Under the Protocol, Parties report on domestic releases only, but many of the companies responsible for production and sales of these chemicals have international operations that cut across many national jurisdictions. The private sector has developed a parallel reporting process under which private organizations gather global or international production data directly from corporate producers. Corporate reporting to a private organization or trade association enables producers to report their sensitive information in a manner that preserves its confidentiality (see figure 1, box H3).

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[20] European Council Directive of 7 June 1990 on freedom of access to information on the environment (90/313/EEC), Article 3.2.

[21] United States Freedom of Information Act (FOIA), 5 USC 552(b).

[22] CITES: MIKE Site Form 5: Intelligence Monitoring Form; Informant Code. Available at: http://www.cites.org/eng/programme/MIKE/part_VIII/5%20Intelligence%20Monitoring(entry%20and%20instruction).shtml

[23] See the "Ozone Treaties," including the 1997 Montreal Protocol and its amendments, at: http://www.unep.ch/ozone/treaties.shtml

44. Since 1976, the chemical industry has voluntarily reported the production and sales of fluorocarbons through a survey compiled by independent accountants. In 1998, the Alternative Fluorocarbons Environmental Acceptability Study (AFEAS) was commissioned to conduct annual surveys and to provide the scientific community with data on the atmospheric release of CFCs and the alternative fluorocarbons, HFCs and HCFCs. Data on global production and sales are available through 2000 for CFCs, HCFCs, and HFC-134a. The AFEAS data are aggregated to protect the release of data on individual companies, and as a means of maintaining the confidentiality of consumption data.

45. Under WTO rules of procedure for the operation of independent reviews on preshipment inspection, a selected person may be an independent lawyer nominated by both parties who then reports to the authorities.[24] In other cases, such as the customs procedures of NAFTA, the information provided, which a Party deems confidential, may be disclosed only to selected authorities.[25] Oral proceedings, in which confidential information is presented, may then be held in camera and only certain pre-specified persons may be present at such proceedings (see figure, box H3).[26]

46. Once again, these approaches help in the collection of the information needed and in ensuring that confidentiality is respected by making all the data available only to a limited number of people or authorities.

C. Procedures and guidance on access to, and processing of, confidential information

47. Information designated as confidential may be accessed under either special rules and procedures or practical guidance and experience. Such procedures and guidance may specify how physical access will be granted, who will be allowed access, and how third parties may (or may not) request such access. A general principle with regard to access to confidential information is that it should be allowed on a "need-to-know" basis and to those persons with a duty to keep the information confidential.

48. Some agreements, such as the WTO and NAFTA Agreements, require that persons with access to confidential information have a duty to maintain its confidentiality and are obliged not to use it to gain personal advantage or advantage for others. Under the WTO, for example, each "covered person" under the dispute settlement procedure is legally obliged to maintain the confidentiality of "any information identified by a Party as confidential".[27] It is the responsibility of each interested party to ensure that these persons maintain the confidentiality of certain information (see figure, box A2).[28]

49. Some agreements may include rules of conduct or more general guidance to staff with regard to the processing of confidential information. In general, personnel contracts – especially those entered into with persons who will have access to confidential information – may include provisions destined to safeguard the confidentiality of certain information and procedures. In most cases, however, practices have developed as a result of experience or general guidance from the Parties and convention bodies.

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[24] WTO: Annex III: Rules of procedure for the operation of independent reviews under Article 4 of the WTO agreement on preshipment inspection (9. Confidentiality, 9.2.). Available at: http://www.wto.org/english/news_e/pres96_e/psidoc.htm

[25] NAFTA: Part II: Trade In Goods, Chapter Five: Customs Procedures, Section B - Administration and Enforcement (Article 507.2.: Confidentiality). Available at: http://www.nafta-sec-alena.org/english/index.htm

[26] NAFTA: Rules of Procedure for Article 1904; Binational Panel Reviews: Part VI ORAL PROCEEDINGS (Oral Proceedings in Camera 69). Available at: http://www.nafta-sec-alena.org/english/index.htm

[27] WTO: WT/DSB/RC/1 (96-5267): Rules of conduct for the understanding on rules and procedures governing the settlement of disputes; VII. Confidentiality. Available at: http://www.wto.org/english/tratop_e/dispu_e/rc_e.htm See also, NAFTA: Code of Conduct for Dispute Settlement under Chapters 19 and 20; VI. Maintenance of Confidentiality. Available at: http://www.nafta-sec-alena.org/english/index.htm

[28] NAFTA: Article 1905 Special Committees: Rules 30-45 (Confidentiality 39.2.). Available at: http://www.nafta-sec-alena.org/english/index.htm

Such practices may include the relevant – or designated – department keeping confidential information in a specially dedicated location and only allowing selected persons access to it.[29] Such practical guidance may also include the need for a "sign-off" procedure for a designated person (e.g., a supervisor) before staff are allowed access to confidential information. Furthermore, in accessing electronic data, special passwords may be required which provide automated tracking of who accessed what data and when.

50. In cases where the authority may contract a third party to undertake a task that may include having access to confidential information, special procedures may also be put in place, including specific confidentiality agreements between the authority and the third party.

51. The Chemical Weapons Convention, because of the extremely sensitive nature of the information it deals with, includes rather detailed provisions on the treatment of confidential information and the conduct of personnel in the Technical Secretariat dealing with such information. The general operating principle under this convention is to prevent confidential information from being divulged without proper authorization. Nonetheless, the convention also includes rules on what to do in the case of a breach of confidentiality. Hiring procedures "shall be such as to ensure that access to, and handling of, confidential information shall be in conformity with the procedures established" in the agreement. Furthermore, "Each position in the Technical Secretariat shall be governed by a formal position description that specifies the scope of access to confidential information, if any, needed in that position."[30] Persons that have had access to confidential information under the terms of the agreement are subject to strict disciplinary action and termination of employment for breaches of confidentiality. Former staff remain obliged not to disclose such information even after the termination of their functions.[31]

52. The rules or practice governing the processing of confidential information in an agreement may require an annual report on the operation of such rules or practice to be prepared by the relevant authority and submitted to the Conference of the Parties to that agreement for consideration. For example, under the Chemical Weapons Convention, the "Director-General shall report annually to the Conference on the implementation of the regime governing the handling of confidential information by the Technical Secretariat".[32]

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[29] In the case of the Chemical Weapons Convention a designated unit of the secretariat is "charged with overall supervision of the administration of confidentiality provisions".

[30] Chemical Weapons Convention, paragraphs 5 and 6.

[31] Ibid. paragraph 7.

[32] Ibid. paragraph 3.